Supreme Court U.S.
FILED
MAR 28 2002
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(2)

No. 01-1235

In The

Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

GEORGE BURNETT,

Respondent.

On Petition For A Writ Of Certiorari To The Ohio Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

H. FRED HOEFLE
(Counsel of Record)

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4pp
5f/o

STATEMENT OF THE CASE

In 1996 the City of Cincinnati, through the City Council, enacted Ordinance No. 229-1996, codified as Chapter 755, Cincinnati Municipal Code, Drug Exclusion Zones. The city ordinance authorizes the exclusion of individuals from a large area of the city for 90 days after arrest and/or one year after conviction for specified drug crimes. The ordinance provides an administrative appeal and variance procedure through the Police Department.

Respondent, George Burnett, was arrested on February 7, 1998, and was charged with possessing drug paraphernalia, one of the specified drug crimes in Chapter 755, and given notice of the 90 day exclusion. After his conviction on this charge, the city, outside of the court proceedings, immediately gave the Respondent notice of his one year exclusion from the "exclusion zone." On June 23, 1998, the Respondent was found in the "exclusion zone" and arrested for criminal trespass, a violation of the Ohio Revised Code. Respondent pled not guilty and filed a Motion to Dismiss on state and federal constitutional grounds. His motion to dismiss was denied and, after trial to the Court, he was convicted of criminal trespass and appropriately sentenced, with a stay being granted for appeal.

The Respondent appealed his conviction to the Ohio Court of Appeals, First Appellate District, which affirmed the conviction. He then appealed to the Supreme Court of Ohio, which after argument, reversed the conviction and declared Cincinnati Municipal Code Chapter 755 unconstitutional under the United States Constitution and the Ohio Constitution. On October 18, 2001, the Trial Court,

in this matter, dismissed the charge against Mr. Burnett on the basis of the decision of the Supreme Court of Ohio. (see attached certified judge's journal entry) No appeal has been taken from this dismissal.

REASONS FOR DENYING THE PETITION

I. REVIEW SHOUD BE DENIED BECAUSE THIS COURT WILL NOT REVIEW A QUESTION OF FEDERAL LAW BY A STATE COURT IF THE DECISION OF THAT COURT RESTS ON STATE LAW GROUND THAT IS INDEPENDENT OF THE FEDERAL QUESTION AND ADEQUATE TO SUPPORT JUDGMENT.

In the context of a direct review of a state court judgment, independent and adequate state ground doctrine is jurisdictional, because the Supreme Court has no power to review a state law determination that is sufficient to support judgment, where resolution of any independent federal ground for the decision could not attest judgment and would therefore be advisory. *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). The Supreme Court of Ohio, in this case, held Chapter 755 of the Cincinnati Municipal Code to be unconstitutional as a violation of Section 3, Article XVIII of the Ohio Constitution. This Article of the Ohio Constitution provides the authority under which municipalities, such as Cincinnati, are permitted to operate. The Supreme Court of Ohio ruled that Chapter 755 exceeded the authority granted to municipalities and was, therefore, unconstitutional under the Ohio Constitution. Where the judgment of the state court rests on two

grounds, one of which is federal and the other nonfederal in character, the Supreme Court will not undertake to review the decision, if the state court decision indicates clearly and expressly that it is based on bona fide separate, adequate, and independent grounds. *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983); *Fox Film Corporation v. Muller*, 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 (1935) as there is separate, adequate, and independent grounds for the state court's decision under the Ohio Constitution, the Supreme Court jurisdiction and review should not be granted.

II. REVIEW SHOULD BE DENIED BECAUSE THIS COURT DOES NOT GIVE ADVISORY OPINIONS.

The matter on which this Petition is based ceased to be an actual controversy on October 18, 2001, when the trial court dismissed the charge against the defendant and no timely appeal of that decision was undertaken. The Supreme Court does not have the power to give advisory opinion. *Ashwander et al. v. Tennessee Valley Authority et al.*, 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688 (1936). Thus the Supreme Court has no authority to review this case.

CONCLUSION

The petitioner presents no reason for the Court to accept his petition that would make this other than advisory opinion as the case was decided on independent state constitutional grounds and has been dismissed by the trial court. Therefore, this Petition must be denied.

Dated this 27th day of March, 2002.

Respectfully submitted,

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Bruce F. Thompson
Hamilton County Public
Defenders Office
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Facsimile: (513) 346-3707

Attorneys for Respondent

HAMILTON COUNTY MUNICIPAL COURT
JOURNAL ENTRY - MITTIMUS

PAGE: 5

CASE: 98CRB 23819

JUDGE:

DEFENDANT: Burnett / George

CTLNO: 420795 TICKET:

PROB. VIOL: _____

SEC. VIOL: 2911.21A1
CHARGE: Trespass

CLERK'S USE ONLY
INITIALS: _____
PAYMENT DATE: _____ RECEIPT NO: _____
FINE: _____ COSTS: _____ CONCAR: _____
WIT FEES: ____ JURY FEES: _____ P.D. FEES _____
LIP FEE: _____ BMV FEE: _____ TOTAL PAID _____

ARREST DATE:
JMS_NUMBER:
SEX: D.O.B.
DEF. COUNSEL:
PROS. WIT:

App. 1

TO THE SHERIFF OF HAMILTON COUNTY, GREETINGS: Where as, the above defendant was arrested and charged with the above section number. For good cause shown, the defendant is ordered to give bail in the sum indicated below. You are, therefore, commanded to receive the defendant into your custody until the trial date, or until he/she gives bail as ordered. Or, whereas, the above defendant, having been tried and convicted of said charge(s) is sentenced, as indicated below. Therefore, we command you to receive the defendant into your custody, there to remain until he/she has fully executed the terms of the sentence, or until otherwise discharged by due course of law.

DATE	ACTION	SIGNATURE OF JUDGE
6/15/2000	Arraignment - Probable cause to hold demonstrated ( ) YES ( ) NO THE BOND SHALL BE $_____ MAY BE AT 10% ( ) YES ( ) NO	
	Cont stay pendy appeal	
12-15-00	Cont stay pendy appeal	
06-15-01	Cont. stay pendy appeal	
10-18-01	The judgment of the court of appeals having been reversed by the Supreme Court, the ordinance pro-hibiting the defendant from being on the property having been found unconstitutional the fundy and sentence are vacated and the charge is dismissed.	

I, James Cissell, Clerk of the Hamilton County Municipal Court, Hamilton County, Ohio, certify that this is a true and correct copy of the original filed in this office.
By _____ Deputy Clerk

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HAMILTON COUNTY MUNICIPAL COURT
JOURNAL ENTRY - **MITTIMUS**

CASE: 98-CRB-23819 JUDGE: STOCKDALE

DEFENDANT: BURNETT / GEORGE

CTLNO: 420795 TICKET: PROB. VIOL: _____

SEC. VIOL: 2911.21A1
CHARGE: TRESPASS KNOW.

ARREST DATE: 10-24-98
JMS_NUMBER:
SEX: M D.O.B. 10-18-55
DEF. COUNSEL:
PROS. WIT:

CLERK'S USE ONLY
INITIALS: _____
PAYMENT DATE: _____ RECEIPT NO: _____
FINE: _____ COSTS: _____ CONCAR: _____
WIT FEES: ____ JURY FEES: _____ P.D. FEES _____
LIP FEE: _____ BMV FEE: _____ TOTAL PAID _____

App. 2

TO THE SHERIFF OF HAMILTON COUNTY, GREETINGS; Where as, the above defendant was arrested and charged with the above section number. For good cause shown, the defendant is ordered to give bail in the sum indicated below. You are, therefore, commanded to receive the defendant into your custody until the trial date, or until he/she gives bail as ordered. Or, whereas, the above defendant, having been tried and convicted of said charge(s) is sentenced, as indicated below. Therefore, we command you to receive the defendant into your custody, there to remain until he/she has fully executed the terms of the sentence, or until otherwise discharged by due course of law.

DATE	ACTION	SIGNATURE OF JUDGE
	Arraignment - Probable cause to hold demonstrated ( )YES ( )NO THE BOND SHALL BE $_____ MAY BE AT 10% ( )YES ( )NO	
12-23-98	Stay pendy appeal	Stockdale
6-23-99	Stay Pendy appeal	Stockdale
12-23-99	RAC ~~from~~ 1-20-00 9:00 for stay on sentence - please notify PD Bruce Thompson	Stockdale
1.20.00	Continue stay pendny appeal to Supreme Court	Stockdale

I, James Cissell, Clerk of the Hamilton County Municipal Court, Hamilton County, Ohio, hereby certify the above to be a true and correct copy of the original.

By _____ Deputy Court Clerk

HAMILTON COUNTY MUNICIPAL COURT
JOURNAL ENTRY - **MITTIMUS**

CASE: 98 CRB 23819 JUDGE: STOCKDALE

DEFENDANT: Burnett, George

CTLNO: 420795 TICKET:

PROB. VIOL: _____

SEC. VIOL: 2911.21A1

CHARGE: TRESPASSING

ARREST DATE: 10-24-98

JMS_NUMBER:

SEX: M D.O.B. 10-18-55

DEF. COUNSEL:

PROS. WIT:

CLERK'S USE ONLY
INITIALS: _____
PAYMENT DATE: _____ RECEIPT NO: _____
FINE: _____ COSTS: _____ CONCAR: _____
WIT FEES: _____ JURY FEES: _____ P.D. FEES: _____
LIP FEE: _____ BMV FEE: _____ TOTAL PAID _____

TO THE SHERIFF OF HAMILTON COUNTY, GREETINGS: Where as, the above defendant was arrested and charged with the above section number. For good cause shown, the defendant is ordered to give bail in the sum indicated below. You are, therefore, commanded to receive the defendant into your custody until the trial date, or until he/she gives bail as ordered. Or, whereas, the above defendant, having been tried and convicted of said charge(s) is sentenced, as indicated below. Therefore, we command you to receive the defendant into your custody, there to remain until he/she has fully executed the terms of the sentence, or until otherwise discharged by due course of law.

DATE	ACTION	SIGNATURE OF JUDGE
	Arraignment - Probable cause to hold demonstrated ( ) YES ( ) NO THE BOND SHALL BE $_____ MAY BE AT 10% ( ) YES ( ) NO	
11-20-98 cont	Made. It's motion to amend complaint to conform to evidence that notice was given by Sgt Irving rather than P.O. Kowalski granted. Rule 29 motion denied. Renewed Motion under Rule 29	Stockdale
	Found Guilty. 10 days. CR. Stay on days. 12-23-98 9:00 (S to appeal	Stockdale

I, James Cissell, Clerk of the Municipal Court, Hamilton County, Ohio, hereby certify the above to be a true and correct copy of the original.

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App. 3

HAMILTON COUNTY MUNICIPAL COURT
JOURNAL ENTRY/**MITTIMUS**

CASE NO: 98-CRB-23819
CTLNO: 420795 TICKET:
JMS NUMBER:
SEC. VIOL: 2911.21A1
CHARGE: TRESPAS IKNOW.
ARREST DATE:
DEFENDANT: BURNETT, George
10-24-98
SEX: D.O.B.:
DEF. COUNSEL:
PROS. WIT:

JUDGE: STOCKDALE

CLERK'S USE ONLY
ITEM NO:_____
PAYMENT DATE:_____ RECEIPT NO:_____
FINE:_____ COST:_____ CONCAR:_____
WITNESS FEES:_____ JURY FEES:_____
BMV FEE:_____ LIP FEE:_____

TO THE SHERIFF OF HAMILTON COUNTY,GREETINGS: Whereas, the above defendant was arrested and charged with the above section number. For good cause shown, the defendant is ordered to give bail in the sum indicated below. You are,therefore, commanded to receive the defendant into your custody until the trial date, or until he/she gives bail as ordered. Or,whereas, the above defendant, having been tried and convicted of said charge(s) is sentenced, as indicated below. Therefore we command you to receive the defendant into your custody, there to remain until he/she has fully executed the terms of the sentence, or until otherwise discharged by due course of law.

DATE	ACTION	SIGNATURE OF JUDGE
10-2-98	Continue as scheduled.	
10-2-98	/98/CRB/23819 CH174 9:00 AM BURNET/GEORGE DELL 10/19/1998 MD Entry	
10-19-98	10/26/98 9:00 D's motion for argument S.B.	
10-26-98	RAC + trial D's motion denied. SB.	
	/98/CRB/23819 CH174 9:00 AM BURNET/GEORGE DHAS 11/09/1998 NJ	
11-9-98	Cont ptys req RAC	
11/20	/98/CRB/23819 CH174 10:30 AM BURNET/GEORGE DELL 11/20/1998 NJ	
11-20-98	Witnesses sworn trial had ptx 1, 2 admitted. Rule 29 motion	

App. 4

HAMILTON COUNTY MUNICIPAL COURT
JOURNAL ENTRY

TODAY'S DATE 06/24/98

CASE NO :/98/CRB/23819
CTLNO :420795 TICKET:
City
DEFENDANT :BURNET/GEORGE
SEX : M DOB: 10/18/55

SEC VIOL :2911-21A1 ORCN
CHARGE :TRESPASS-KNOWINGLY M4

DATE OF ARREST:06/23/98

DEF COUNSEL : B. Thompson 23560
PROS. WIT :RHONE/PO

JUDGE: STOCKDALE/DAVID/C

PROB.VIOL _____

CLERK'S OFFICE USE ONLY
Payment Date:_____Receipt No.:_____
Fine:_____Cost:_____Concar:_____
Witness Fees:_____Jury Fees:_____
Total Paid:_____Deputy Clerk:_____

DATE	ACTION	SIG. OF JUDGE
06/24/98 9:30 am	ROOM: JCB ARRAIGNMENT-PROBABLE CAUSE TO HOLD DEMONSTRATED ( )YES ( )NO	ARGN JUDGE: 184 BLACK/TIMOTHY/S
	NG - RAC for trial S.O.R bond w/ cond. Δ stays out of over the Rhine	Black
	/98/CRB/23819 CH174 9:00 AM BURNET/GEORGE AROM 08/04/1998 Time Provisions of O.R.C. 2945.71 et. seq. extended from 6.24.98 to 8.4.98	
8.4.98	Cont Arrg PT 8-18-98 9:00	Stockdale
	ORs	
8.18.98	Defendant to file motion to dismiss	E Rhone
9/15/98	by 9/14/98. City to respond by 9/28/98 - 10/2/98 9:00 for hearing on Δ's motion - Δ waives time	Stockdale

over for sentence CMSR1241

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